TRAINING AND EMPLOYMENT NOTICE	**NO.** 27-23, Change 1
	DATE October 2, 2024

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE MONITOR ADVOCATES
EMPLOYMENT SERVICE OFFICE MANAGERS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARDS
LABOR COMMISSIONERS
AMERICAN JOB CENTERS

FROM: JOSÉ JAVIER RODRÍGUEZ /s/
Assistant Secretary

SUBJECT: Change 1 – Announcing Implementation of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, in Compliance with District Court Order

1. **Purpose.** To update Training and Employment Notice (TEN) No. 27-23 regarding states' implementation of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 FR 33898 (Apr. 29, 2024) (Farmworker Protection Rule), in light of an August 26, 2024, court order prohibiting the U.S. Department of Labor (Department or DOL) from enforcing the Final Rule in 17 states and against Miles Berry Farm and members of the Georgia Fruit and Vegetable Growers Association as of August 26, 2024.

2. **Action Requested.** Please share this information with interested stakeholders and review the regulations and information collections. Until further notice, the 17 states listed in this Change 1 that are covered by the court order must comply with the Employment Service (ES) regulations at 20 CFR parts 651, 653, and 658 that were in effect on June 27, 2024, the calendar day *before* the effective date of the Farmworker Protection Rule. All other states[1] must comply with the current ES regulations, including the ES-related changes in the Final Rule, as of the June 28, 2024.

3. **Summary and Background.**

    a. Summary – This TEN explains that the State Workforce Agencies (SWAs) for the 17 states listed in section 3.b of this Change 1 must comply with the ES regulations that

[1] As defined in sec. 2 of the Wagner-Peyser Act, 29 U.S.C. 49a, this includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. 37 states, including these entities, are not subject to the preliminary injunction.

were in effect on June 27, 2024, and that the remainder of the states must comply with the ES regulations, as updated by the Farmworker Protection Rule that was effective June 28, 2024.

b. Background – On April 29, 2024, the Department published in the *Federal Register* the Farmworker Protection Rule, which revises Wagner-Peyser Act ES regulations at 20 CFR parts 651, 653, and 658. The Final Rule strengthens protections for workers who are placed on clearance orders through the Agricultural Recruitment System (ARS) as well as clarifies and streamlines procedures for instances where SWAs discontinue ES services to employers, both agricultural and non-agricultural. The Final Rule also revises DOL's H-2A regulations at 20 CFR part 655, subpart B and 29 CFR part 501. Also on April 29, the Employment and Training Administration (ETA) published TEN No. 27-23 titled Announcing the Publication of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, which describes the changes DOL made in the Final Rule to the ES regulations.

   On August 26, 2024, the United States District Court for the Southern District of Georgia issued a preliminary injunction in the case of *Kansas, et al. vs. U.S. Department of Labor*, No. 2:24-cv-00076-LGW-BWC (S.D. Ga., Aug. 26, 2024), prohibiting DOL from enforcing the Farmworker Protection Rule in certain states and with respect to certain entities. The preliminary injunction specifically prohibits DOL from enforcing the Farmworker Protection Rule in the states of Georgia, Kansas, South Carolina, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, and Virginia, and against Miles Berry Farm and members of the Georgia Fruit and Vegetable Growers Association as of August 26, 2024. DOL is complying with the preliminary injunction. Accordingly, this Change 1 describes the effect of the preliminary injunction on states' implementation of the Final Rule.

4. **Key Final Rule Changes and Applicability.** The Department published the Farmworker Protection Rule in the *Federal Register* on April 29, 2024, available at https://www.federalregister.gov/documents/2024/04/29/2024-08333/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states. The Final Rule amended several portions of the ES regulations, as described in TEN No. 27-23. All SWAs, except for the 17 SWAs in the states listed in section 3.b above, must comply with all of the Final Rule changes. Please see the Final Rule and TEN No. 27-23 for a complete list of all changes. The SWAs serving the 17 states listed in section 3.b (hereinafter referred to as "the 17 SWAs" or "the 17 states") must comply with the ES regulations that were in effect on June 27, 2024. These 17 SWAs may access the ES regulations that were effective on that date by visiting https://www.ecfr.gov/, selecting "Go to Date," then selecting June 27, 2024 from the calendar.

   a. **Clearance Orders for U.S. Workers**.

      i. The Final Rule revised the responsibilities of ES offices and SWAs when they review clearance orders submitted by employers and the process by which they place approved clearance orders into intrastate and interstate clearance, by requiring ES

staff to consult the Department's Office of Foreign Labor Certification (OFLC) and Wage and Hour Division (WHD) H-2A and H-2B debarment lists, and a new prospective ETA Office of Workforce Investment (OWI) discontinuation of services list, before placing a job order into intrastate or interstate clearance. If an employer is on one of the debarment lists, the SWA must initiate discontinuation of ES services to such employer. If the employer is on the OWI discontinuation of ES services list, or the SWA has already discontinued ES services, the SWA must not approve the clearance order.

- **The 17 SWAs** are not required to check these lists prior to placing a job order into clearance. Each of these SWAs must continue to disapprove clearance orders submitted by employers whose ES services the SWA has discontinued.

ii. The Final Rule requires that SWAs must ensure intrastate and interstate clearance orders include the hourly wage rate, if applicable, and any non-hourly wage rate offered, including a piece rate or base rate and bonuses and, for any non-hourly wage rate, an estimate of its hourly wage rate equivalent for each activity and unit size.

- **The 17 SWAs** are not required to follow this rule. These states must only ensure that intrastate and interstate clearance orders include the hourly wage rate or the piece rate estimated in hourly wage rate equivalents for each activity and unit size, as previously required at 20 CFR 653.501(c)(1)(iv)(E) (June 27, 2024).

iii. The Final Rule revised clearance order assurances and employer requirements regarding protections for workers placed through the ES on criteria and non-criteria clearance orders when employers fail to provide timely notice of delayed start dates.

Under the Final Rule:

- Employers must notify workers the SWA placed, in addition to notifying the SWA, of a delayed start date at least 10 business days before the original start date. The Final Rule also describes how notice must be provided to workers, including compliance with the language access requirements of 29 CFR 38.9 for workers with limited English proficiency, standards for non-written telephonic notice as well as written notice through email or postal mail, and record retention requirements.
- When employers fail to provide the required notice, they must provide housing for migrant workers, provide or pay wages and all other benefits and expenses described on the clearance order for each day work is delayed up to 14 calendar days, starting with the originally anticipated date of need, or provide alternative work.
- If an employer fails to comply with these requirements, the order-holding office must process the information as an apparent violation and may refer the apparent violation to the Department's WHD.

- **The 17 SWAs** must comply with the prior ES regulations, which made certain requirements of employers. They do not need to separately comply with the revised clearance order assurances and employer requirements set forth in the Final Rule and summarized just above. SWAs must ensure the employers include the correct assurance, which can be accomplished by using the alternative forms described below. The prior ES regulations required that:
  - The employer provide to workers referred through the clearance system the number of hours of work cited in 20 CFR 653.501 (c)(1)(iv)(D) for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 business days prior to the original date of need (pursuant to 20 CFR 653.501 (c)(3)(iv)) by notifying the order-holding office in writing (email notification may be acceptable). The SWA must make a record of this notification and must attempt to inform referred workers of the change expeditiously. See 20 CFR 653.501(c)(3)(i) (June 27, 2024).
  - If there is a change to the anticipated date of need and the employer fails to notify the order-holding office at least 10 business days prior to the original date of need the employer must pay eligible (pursuant to 20 CFR 653.501(d)(4)) workers referred through the clearance system the specified hourly rate of pay, or if the pay is piece-rate, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need or provide alternative work if such alternative work is stated on the clearance order. If an employer fails to comply under this section the order holding office may notify the Department's Wage and Hour Division for possible enforcement.

b. Agricultural Recruitment System for U.S. Workers (ARS) and Interstate Clearance of Job Orders.

All SWAs must continue to clear job orders through the Agricultural Recruitment System, including intrastate and interstate clearance. In doing so, states will use the appropriate 790, 790A, and 790B forms as described below and in Section 4d.

- **For the 17 SWAs**:
  - These SWAs must use the forms approved on September 12, 2024 and September 19, 2024, with OMB control number 1205-0562 for clearance orders.
  - When one of the 17 states needs to process a non-criteria interstate clearance order for an employer located within its state (as an order-holding state), the SWA must send at least one copy of the approved clearance order to each of the SWAs that the ETA Regional Administrator selected for recruitment (labor supply states), regardless of whether those SWAs are in states subject to the injunction.
  - When one of the 17 states is designated as a supply state, 20 CFR 653.501(d)(12) continues to require that the SWA actively recruit workers for referral. This may involve receiving clearance orders from

any of the 37 states that are using forms approved with OMB control number 1205-0134. These forms include requirements and assurances associated with the Final Rule. SWAs in enjoined states do not need to take any steps to review or validate those requirements and assurances.

- SWAs in the 17 states subject to the injunction may not reject a clearance order from any of the 37 states on the basis that the state used a form approved under OMB control number 1205-0134, which includes requirements and assurances associated with the Final Rule. However, as provided at 20 CFR 653.501(d)(12), a potential labor supply SWA may reject a clearance order for other reasons, which must be documented and submitted to the Regional Administrator having jurisdiction over the SWA.
- When criteria interstate clearance is necessary, the Department's OFLC will transmit the approved clearance order to the supply state SWAs through the Foreign Labor Agricultural Gateway (FLAG) system.

For SWAs in the 37 states not subject to the injunction:

- These SWAs must use the forms approved with OMB control number 1205-0134, associated with the Final Rule, for clearance orders.
- When one of the 37 states needs to process a non-criteria interstate clearance order for an employer located within its state (as an order-holding state), the SWA must send at least one copy of the approved clearance order to each of the SWAs the ETA Regional Administrator selected for recruitment (labor supply states), regardless of whether those SWAs are in states subject to the injunction.
- When one of the 37 states is designated as a supply state, the SWA must actively recruit workers for referral. This may involve receiving clearance orders from any of the 17 enjoined states that are using forms approved with OMB control number 1205-0562. These forms do not include requirements or assurances associated with the Final Rule.
- SWAs in the 37 states not subject to the injunction may not reject a clearance order from any of the 17 enjoined states on the basis that the state used a form approved under OMB control number 1205-0562, which does not include requirements and assurances associated with the Final Rule. However, as provided in 20 CFR 653.501(d)(12), a potential labor supply SWA may reject a clearance order for other reasons, which must be documented and submitted to the Regional Administrator having jurisdiction over the SWA.
- When criteria interstate clearance is necessary, the Department's OFLC will transmit the approved clearance order to the supply state SWAs through the FLAG system.

c. **Discontinuation of ES Services**.

The Final Rule made revisions throughout 20 CFR 658, subpart F to clarify and streamline the discontinuation of ES services procedures. For a description of these changes, see TEN No. 27-23.

The requirement for SWAs to discontinue providing ES services in certain circumstances existed in the previous regulations; therefore, all SWAs are expected to discontinue ES services to employers where there is a basis to do so under the applicable regulations.

- **However**, **the 17 SWAs** apply the discontinuation bases and discontinuation procedures in effect on June 27, 2024, available at 20 CFR Part 658 Subpart F (June 27, 2024).

The Final Rule includes provisions whereby one state's discontinuation of services would require other states to also deny access to services to that employer. The preliminary injunction has altered the effect of these provisions. Specifically:

i. **The 17 SWAs** must follow the discontinuation of services provisions that were in effect on June 27, 2024.
   - When a SWA in one of the 17 states discontinues services pursuant to the ES regulations in effect on June 27, 2024, the other 37 states cannot disapprove clearance orders or terminate access to services for that employer on the basis of the discontinuation in one of the 17 states.
   - SWAs in these 17 states cannot disapprove clearance orders submitted by an employer where such disapproval would be on the basis of a discontinuation action outside of their own state.
   - While SWAs in these 17 states are not required to check the H-2A or H-2B debarment lists under the Final Rule prior to placing a clearance order, as discussed in section 4(a)(i) above, any SWA that receives notification of a final determination by OFLC or WHD that an employer is debarred from participating in either the H-2A or H-2B program is still required to initiate discontinuation of services to the employer. Debarment is a determination that the employer has violated an employment-related law within the meaning of 20 CFR 658.501(a)(4), as in effect on June 27, 2024. Notification of the debarment from OFLC or WHD to the SWA may be provided through, for example, the SWA observing that the employer is on one of the debarment lists.

ii. SWAs for the 37 states not impacted by the injunction must continue to follow new discontinuation of services provisions in effect as of June 28, 2024. This includes notifying ETA's Office of Workforce Investment (OWI) of any final determination to discontinue, determination to immediately discontinue, or determination to reinstate ES services to an employer as detailed in 20 CFR 658.503 and .504. ETA will publish such discontinuations on the OWI discontinuation of services list.

- These states must disapprove an employer's clearance order if the employer is on the OWI discontinuation of services list.
- These states must also discontinue services for any of the bases in 20 CFR 658, subpart F in effect as of June 28, 2024. This may include discontinuing services to an employer that one of the 17 states discontinued, though not necessarily on the basis of that initial state's discontinuation.

It is possible that two SWAs (in states impacted and not impacted by the injunction) may discontinue services to an employer on different bases. For instance, one of the 17 states discontinues services because an employer refused to correct specifications contrary to employment-related laws on a job order or were found by a final determination of an enforcement agency to have violated an employment-related law. None of the 37 states can discontinue on the basis of that initial state's discontinuation because that initial state is not required to notify ETA or other states about the discontinuation. However, any of the 37 states can discontinue because that state also determines that the employer violated employment-related laws. The state then must notify ETA, which posts the employer on the OWI Discontinuation of Services list. At this point, two states have discontinued services on the same or a very similar basis, one state covered by the injunction and one not covered by the injunction. Others of the 37 states would not provide ES services to the employer because the employer is listed on the OWI Discontinuation of Services list. At this point, two or more states have discontinued services on different bases, some for the underlying violation of an employment-related law, and some because the employer is listed on the OWI Discontinuation of Services list.

Similarly, it is possible for one of the 37 states to discontinue services because of an underlying violation of an employment-related law, the state notifies ETA which posts it on the OWI Discontinuation of Services list, and others of the 37 states would not provide ES services to the employer. None of the 17 states would be required to discontinue services on the basis of the initial state's discontinuation. However, any of the 17 states could independently initiate discontinuation of ES services if they have sufficient evidence (other than basic knowledge of the initial state's discontinuation) to meet any of the bases described at 20 CFR 658.501, as effective prior to June 28, 2024.

d. Updated Clearance Order Forms.

The Final Rule also impacts associated information collections, notably for Forms ETA-790 and 790A through Office of Management and Budget (OMB) approval number 1205-0466, which are used for criteria clearance orders placed in connection with H-2A applications, and Form ETA-790B through OMB approval number 1205-0134, which is used for non-criteria clearance orders. All states and employers, except for the 17 states listed in section 3.b must use these forms, as provided through OMB approval numbers 1205-0466 and 1205-0134.

- **The 17 SWAs** must use Forms ETA-790, 790A, and 790B, as provided through OMB approval number 1205-0562 approved on September 12, 2024, which do not implement the Farmworker Protection Rule. States can access

these forms on the Monitor Advocate System resources webpage https://www.dol.gov/agencies/eta/agriculture/monitor-advocate-system/resources. Section 4.b of this guidance described how these forms would be used in interstate clearance.

5. **Inquiries.** Please direct inquiries to the appropriate ETA regional office. Additional information about changes to the regulations governing the H-2A program is available on the Department's OFLC and WHD websites at https://www.dol.gov/agencies/eta/foreign-labor/farmworker-protection-final-rule and https://www.dol.gov/agencies/whd/agriculture/h2a/final-rule, respectively.

6. **References.**
   - *Improving Protections for Workers in Temporary Agricultural Employment in the United States* Final Rule (89 FR 33898, April 29, 2024)
   - The Wagner-Peyser Act of 1933, 29 U.S.C. 49 et seq.
   - Employment Service Regulations at 20 CFR parts 651, 653, and 658
   - TEN No. 27-23, Announcing the Publication of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*

7. **Attachment(s).** N/A